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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RICHARD WEISSMAN,

Plaintiff and Appellant,

v.

PHILLIPS FINANCIAL GROUP et al.,

Defendants and Respondents.

B205758

(Los Angeles County
Super. Ct. No. C756611)

APPEAL from an order of the Superior Court of Los Angeles County,
Elizabeth A. Grimes, Judge. Reversed with directions.

Roger L. Stanard for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

Appellant Richard Weissman, a court appointed receiver (the receiver), appeals an order denying his request for additional compensation.

The receiver sought \$188,247.50 for fees incurred in his unsuccessful attempt to obtain cancellation of tax penalties amounting to \$144,861.65 on behalf of Westoaks Investment #27 (Westoaks 27). The trial court awarded the receiver \$12,886.50 on said fee request, ruling the receiver should not have pursued the effort to obtain cancellation of the penalties. On a motion for reconsideration, the trial court did not award the receiver any additional compensation.

Because the receiver previously had obtained judicial approval to pursue cancellation of tax penalties, in the case at bench the trial court abused its discretion in denying compensation on the ground the receiver should not have sought cancellation of the penalties. Therefore, the order is reversed and the matter is remanded for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

I. EARLIER PROCEEDINGS

1. The complaint.

The Commissioner of Corporations (Commissioner) filed an action on March 28, 1990. Named as defendants were Olen Boyce Phillips (Phillips), several companies and partnerships bearing his name, several other companies, 36 limited partnerships entitled “Westoaks Investment,” each bearing a different numerical designation (e.g., “Westoaks Investment # 9, a California limited partnership”), and the Phillips Financial Group (PFG). The complaint alleged Phillips was the general partner of the limited partnership defendants, and the president and manager and/or controlling supervisor of 10 defendant companies. In the suit, the Commissioner sought to enjoin the defendants from, among other things, operating what amounted to a Ponzi scheme, engaging in other acts of fraud and violations of state securities laws, and acting upon the real and personal property assets in their possession or under their control. The Commissioner also requested an order for payment of civil penalties by the defendants for each and every one of their acts that violated corporate securities laws. A receiver

was requested and attorney Weissman was appointed to that position on the date the suit was filed. He took control of the defendant entities and remained the receiver throughout the case.

2. The default judgment.

A default judgment was signed and filed on August 12, 1996. Weissman was directed to continue as receiver in the case and to submit a written plan for distribution of the defaulting defendants' assets. The court retained jurisdiction to implement the terms of its orders (past or future) and to entertain applications and motions by any party for additional relief.

3. The motions to have Ventura cancel the real property tax penalties.

In 1999, following the sale of real property, Westoaks 27 paid the delinquent property taxes and penalties it owed to the County of Ventura (Ventura) from the proceeds of escrow. A request for cancellation of penalties could have been filed as soon as the taxes and penalties were paid. However, the receiver did not seek relief from the penalties at that time.

Finally, *five years later*, on March 4, 2004, after obtaining authorization from the previous trial judge in this matter (Judge Murphy), the receiver filed a motion in the superior court for an order directing Ventura to show cause why the court should not order that county to cancel all real property tax delinquency penalties, costs and other charges (hereinafter referred to collectively as penalties) resulting from a delinquency in payment of real property taxes by defendant Westoaks 27. The authority cited for such relief was Revenue and Taxation Code section 4985.2 (section 4985.2).¹ The basis of the

¹ Section 4985.2 states: "Any penalty, costs, or other charges resulting from tax delinquency may be canceled by the auditor or the tax collector upon a finding of any of the following: [¶] (a) Failure to make a timely payment is due to reasonable cause and circumstances beyond the taxpayer's control, and occurred notwithstanding the exercise of ordinary care in the absence of willful neglect, provided the principal payment for the proper amount of the tax due is made no later than June 30 of the fourth fiscal year following the fiscal year in which the tax became delinquent. [¶] (b) There was an inadvertent error in the amount of payment made by the taxpayer, provided the principal

motion was the receiver's assertion that (1) Westoaks 27 did not have any financial resources with which to timely pay real property taxes to Ventura from approximately 1985 through the date of the sale of Westoaks 27's real property in April 1999, (2) like the other Westoaks Investment defendants, Westoaks 27 was controlled by its general partner, Phillips, and (3) Phillips had not paid the taxes owed by the partnership.

Subsequently, another show cause hearing for relief from tax penalties, also directed at Ventura, was set pursuant to a request by a private attorney acting on behalf of Westoaks 58. Westoaks 58 sought recovery of \$140,736.33 in tax penalties it had paid on April 22, 1996. Like the receiver's motion, Westoaks 58's motion was based on the fraudulent scheme practiced by the PFG defendants, and it relied on section 4985.2 for statutory authority.

4. The trial court grants motions by Westoaks 27 and Westoaks 58 to cancel the Ventura tax penalties.

On July 13, 2004, the trial court (Judge Murphy) granted the motions to cancel the tax penalties imposed by Ventura on Westoaks 27 and Westoaks 58.

Concluding that it had independent authority, under section 4985.2, subdivision (c), to cancel the tax delinquency penalties, and "broad powers over administration and protection of the property subject to the receivership pursuant to Gov. Code § 13975.1," the court cancelled tax delinquency penalties in the sums of \$144,861 on behalf of Westoaks 27, and \$140,736 on behalf of Westoaks 58.

Ventura appealed.

payment for the proper amount of the tax due is made within 10 days after the notice of shortage is mailed by the tax collector. [¶] (c) The cancellation was ordered by a local, state, or federal court."

5. *The first appeal.*

The primary issue in the first appeal (*People ex rel. Strumpfer v. Westoaks Investment # 27* (2006) 139 Cal.App.4th 1038 (*Westoaks I*)) was whether subdivision (c) of section 4985.2 was intended to give authority to courts to issue orders canceling tax delinquency penalties. Stated another way, the issue was whether (1) subdivision (c) of section 4985.2, in and of itself, authorizes courts to order the cancellation of such penalties, or (2) the only authority that subdivision (c) provides is to authorize auditors and tax collectors to cancel delinquency penalties when ordered to do so by a court that has based its cancellation order on some other statute or on another provision of section 4985.2. (*Westoaks I, supra*, at pp. 1046-1047.)

This court concluded subdivision (c) of section 4985.2 was “meant to do no more than give county tax officials the legal permission to comply with court orders issued pursuant to authority *other than subdivision (c)*. That subdivision was *not* meant to provide courts with the independent authority to make otherwise unauthorized tax delinquency penalty relief orders.” (*Westoaks I, supra*, 139 Cal.App.4th at pp. 1048-1049.) Therefore, the order granting the motions to cancel the tax penalties imposed by Ventura on Westoaks 27 and Westoaks 58 was reversed and the matter was remanded for further proceedings under section 4985.2, subdivisions (a) and (b). (*Westoaks I, supra*, at pp. 1051-1053.)

6. *Proceedings on remand; trial court upheld Ventura’s refusal to cancel penalties.*

On remand, the trial court (Judge Grimes) conducted a hearing on Westoaks 27’s and Westoaks 58’s petitions for writ of mandate. (Code Civ. Proc., § 1085.) On September 26, 2007, the trial court entered judgment denying the petitions filed by Westoaks 27 and Westoaks 58. Westoaks 58 appealed; Westoaks 27 did not.

7. *The second appeal; this court affirmed the judgment denying Westoaks 58's mandamus petition.*

In the second appeal, *Westoaks II*, we affirmed the judgment denying Westoaks 58's mandamus petition, wherein Westoaks 58 sought cancellation of the tax penalties. We held: "The record reflects the tax penalties were paid in 1996, without protest. *Westoaks 58 then waited seven years, until 2003, to request cancellation of the penalties, without showing good cause for the delay.* Further, Westoaks 58's lack of diligence was prejudicial to the County of Ventura . . . because the penalties had been budgeted, expended and distributed to schools, special districts, cities and other local governments, and the County has no means to recover the funds from the distributee agencies. Under these circumstances, Westoaks 58's mandamus action for cancellation of the tax penalties is barred by laches as a matter of law." (*Westoaks Investment #58 v. Matheney* (July 22, 2009, B204149) [nonpub.] slip opn., p. 2.)

II. THE INSTANT PROCEEDINGS

1. *Receiver's request for additional compensation relating to work performed in seeking cancellation of tax penalties on behalf of Westoaks 27.*

As indicated, on September 26, 2007, the trial court entered judgment denying the petitions filed by Westoaks 58 and Westoaks 27 for cancellation of tax penalties. Unlike Westoaks 58, Westoaks 27 did not appeal that ruling.

On November 2, 2007, the receiver, with respect to Westoaks 27, filed a motion for orders approving the receiver's eighth report and seventh account. The eighth report included an accounting for the receiver's fees and costs incurred for the period of October 1, 1999, thru October 2007. The receiver's fee and cost request totaled \$317,592.61, of which \$188,247.50 was for fees incurred solely on the tax penalty cancellation matter on behalf of Westoaks 27.

2. Trial court's ruling.

The matter came on for hearing on December 4, 2007. On December 11, 2007, the trial court (Judge Grimes) issued an order denying the receiver any additional fees but allowing him to retain \$140,231.61 in fees and costs previously advanced.²

The trial court set forth its rationale as follows: “In his December 17, 2003, status conference brief, the receiver advised the court [(Judge Murphy)] that . . . section 4985.2 ‘authorizes the Court to cancel the penalties . . . against a specific real property under circumstances, inter alia, where there is indicated fraud and the payment of taxes is not within the control of the taxpayer.’ In reliance on the receiver’s representations, the court apparently authorized the receiver to take certain actions in an attempt to recover the delinquent penalties paid to Los Angeles and Ventura Counties by Westoaks Investment #27. It is not clear to this court whether or not the receiver advised the court in 2003 and 2004 that there was no authority to support his interpretation of Section 4985.2, which the Court of Appeal found to be ‘a question of first impression.’ The receiver also did not tell the trial court that, since the time the receiver had been appointed in April 1990, the delinquencies were caused by Westoaks Investment #27’s/the receiver’s own decision to defer payment of property taxes until the real property was sold. It does not appear that the receiver told the trial court that, when investors had been asked to pay the taxes, they promptly did so, in March 1991, September 1996, and April 1999.

“In sum, the receiver did not advise the court that pursuit of the recovery of delinquent tax penalties in court was a high-risk strategy that might involve years of litigation, at great expense, or that in the end, the receiver might request (as he has done in his eighth report) an award of fees far in excess of the \$144,861.65 in penalties that he sought to recover for Westoaks Investment #27. *No judge of this court has ever*

² According to the receiver, the effect of this order was that the receiver was awarded only \$12,886.50 on his request for \$188,247.50 in fees incurred in connection with the tax penalty cancellation matter.

authorized or approved the receiver's recovery of fees in any amount, and certainly not in an amount over \$188,000 as requested here, in compensation for the receiver's pursuit of a \$144,861.65 tax penalty cancellation.

“After the Court of Appeal reversed the 2004 trial court order directing Ventura County to cancel the tax delinquency charges, this court [(Judge Grimes)] later found that the Ventura County tax collector applied procedures that are reasonable and that comply with . . . section 4985.2(a), and that Ventura County reasonably concluded that Westoaks Investment #27 did not demonstrate the failure to pay timely property taxes was due to reasonable cause and circumstances beyond the taxpayer's control. Moreover, the court found that the receiver's petition for writ of mandate continuing to pursue cancellation of the tax penalties had little merit, and made little sense, since it added years to this litigation in the pursuit of penalties that were not particularly large in relation to the cost of litigating the issues twice in the trial court and before the Court of Appeal.”
(Italics added.)

For these reasons, the trial court (Judge Grimes) denied the receiver any additional compensation, but allowed the receiver to retain \$140,231.61 in fees and expenses that had previously been advanced.

3. Receiver's motion for reconsideration.

On December 24, 2007, the receiver filed a motion for reconsideration. The new or different facts proffered were that the receiver did not fail to pay the real property taxes, and the investors were unable to pay the taxes as they became due because the investors were in financial ruin. Further, Judge Murphy was duly advised that there were no cases construing section 4985.2 and Judge Murphy anticipated an appeal on the penalties cancellation issue was likely.

4. *Trial court grants reconsideration and denies request for additional fees.*

On February 4, 2008, the trial court granted reconsideration but denied the receiver any additional fees, stating:

“The court has reconsidered its Order of December 11, 2007. The court modifies its Order by vacating its finding that the delinquent tax penalties were caused by Westoaks Investment #27’s/the receiver’s own decision to defer payment of property taxes until the real property was sold. The court recognizes that the receiver advised Judge Murphy, and that Judge Murphy understood, that the question of the court’s power to order refund of tax penalties pursuant to Revenue and Taxation Code section 4985.2 was one of first impression. As an agent of the Court and fiduciary of the assets of the partnerships for the benefit of the investors, however, the receiver owed a greater duty than to simply advise the court that the question was one of first impression.

The receiver should have set forth fully and candidly, in briefs and oral presentations to Judge Murphy, the risks and benefits of the pursuit of his novel theory, together with an analysis of the potential cost to the receivership estate in terms of receivership fees, bookkeeping and other associated costs, and delay in concluding the receivership.

This court believes the receiver invited error by promoting a novel legal theory with little or no rational basis in jurisprudential principles.

“Moreover, the court finds the receiver pursued the matter by launching further litigation that unnecessarily drove up attorney fees and costs, and which struck this court at times as being based on personal decisions of the receiver with no apparent support from any investor. *The receiver’s strategy resulted in an imprudent expenditure of time and money and created needless delay in the resolution of this litigation.* The fees requested by the receiver for his work on the tax delinquency charge litigation are not reasonable and are excessive.

“This court’s Order did not deprive the receiver of reasonable compensation for his efforts. The court in issuing its Order concluded on the basis of the evidence and papers before the court that the receiver had been reasonably compensated for the years he labored on this case, and that an additional fee of \$140,231.61 would reasonably

compensate him for time and expenses for which he had not been previously compensated.” (Italics added.)

The receiver appealed.³

CONTENTIONS

The receiver contends: It is an abuse of discretion for a court to refuse to pay for a receiver’s services which were authorized and instructed by a prior judge; the record refutes the trial court’s findings in support of the decision denying fees for work on the tax cancellation matter; and the order denying fees and costs was unreasonable and punitive.

DISCUSSION

1. *Standard of appellate review.*

“The amount of fees awarded to a receiver is ‘in the sound discretion of the trial court and in the absence of a clear showing of an abuse of discretion, a reviewing court is not justified in setting aside an order fixing fees.’ [Citation.]” (*Melikian v. Aquila, Ltd.* (1998) 63 Cal.App.4th 1364, 1368.)

2. *Trial court abused its discretion in denying the receiver additional compensation on the ground the receiver should not have pursued cancellation of tax penalties.*

As indicated, on December 11, 2007, the trial court (Judge Grimes) issued an order denying the receiver any additional fees but allowing him to retain \$140,231.61 in fees and costs previously advanced. The effect of this order was that the receiver was awarded only \$12,886.50 on his request for \$188,247.50 in fees incurred in connection with the tax penalty cancellation matter.

The receiver contends Judge Grimes in effect overruled Judge Murphy, in that Judge Murphy authorized him to seek cancellation of the tax penalties, yet Judge Grimes

³ An order settling the account of a receiver, and directing the payment of the receiver’s compensation is a final determination of the rights of the parties as to such matter, and is appealable. (CalJur Appellate, § 71.)

largely denied him compensation for those services. We agree that in so doing, Judge Grimes abused her discretion.

The record reflects that on December 17, 2003, at a status conference before Judge Murphy, the receiver proposed the following: “My concept is to file a motion for authority to – for the issuance of an order to show cause. We make it two motions: one for [Westoaks] 38, one for [Westoaks] 27 --.”

Judge Murphy responded “*Sure. Set them on the same day.*”

The receiver continued, “Give notice to the Ventura County Tax Collector, let them come in and argue against the OSC initially, if they wish, or not appear, and we’ll serve the”

Judge Murphy then stated: “*Perfect. That sounds like a great way to handle it.*” (Italics added.)

Thereafter, on March 4, 2004, having obtaining authorization from Judge Murphy, the receiver filed a motion in the superior court for an order directing Ventura to show cause why the court should not order that county to cancel all penalties resulting from a delinquency in payment of real property taxes by Westoaks 27.

On July 13, 2004, Judge Murphy granted the receiver’s motion to cancel the tax penalties imposed by Ventura on Westoaks 27, as well as another motion brought on behalf of Westoaks 58. Concluding the court had independent authority under section 4985.2, subdivision (c), to cancel the tax delinquency penalties, and “broad powers over administration and protection of the property subject to the receivership pursuant to Gov. Code § 13975.1,” Judge Murphy cancelled tax delinquency penalties in the sum of \$144,861 on behalf of Westoaks 27.

Thus, the record establishes the receiver sought cancellation of tax penalties pursuant to the authority expressly conferred on him by Judge Murphy. Further, the fact the receiver initially was successful in obtaining cancellation at the trial court level (even though Judge Murphy's ruling later was reversed on appeal) reflects the receiver's request for cancellation of penalties was arguable, even if ultimately unsuccessful.

In the case at bench, the issue before Judge Grimes was whether the receiver was entitled to recover compensation for his pursuit of cancellation of tax penalties. In this regard, Judge Grimes ruled the receiver failed to advise Judge Murphy "that pursuit of the recovery of delinquent tax penalties in court was a high-risk strategy that might involve years of litigation, at great expense, or that in the end, the receiver might request (as he has done in his eighth report) an award of fees far in excess of the \$144,861.65 in penalties that he sought to recover for Westoaks Investment #27."

Be that as it may, Judge Grimes abused her discretion in denying the receiver any compensation for services in connection with the tax penalty cancellation effort, other than \$12,886.50 previously advanced. These services by the receiver were expressly authorized and instructed by Judge Murphy. Therefore, the issue before Judge Grimes was *not* whether the receiver should have pursued cancellation of tax penalties.

Rather, the role of Judge Grimes was limited to a review of what services the receiver performed, whether those services were reasonably necessary, whether the time incurred to perform those services was reasonable, and whether the rate charged was reasonable and within community standards for such work. The trial court could conclude the receiver's request for \$188,247.50 in fees incurred in pursuing cancellation of tax penalties amounting to \$144,861 on behalf of Westoaks 27 was excessive. However, insofar as Judge Grimes held the entire effort by the receiver to obtain cancellation of tax penalties was misguided, that ruling was an abuse of discretion, in light of Judge Murphy's having greenlighted the receiver's actions in this regard.

DISPOSITION

The order is reversed and the matter is remanded for a new determination of the amount of compensation to which the receiver is entitled for services rendered in connection with the tax penalty cancellation matter, consistent with the principles set forth herein. No costs are awarded.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.